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27 **UNITED STATES DISTRICT COURT**
28 **NORTHERN DISTRICT OF CALIFORNIA**

19 WASHINGTON MUTUAL BANK, a
20 federal savings bank, as successor at law to
21 Long Beach Mortgage Company, a federal
22 savings bank,

23 Plaintiff,

24 v.

25 FIDELITY CAPITAL FUNDING, INC., a
26 California corporation,

27 Defendant.

CASE NO. CV08-1407

JUDGE: Edward M. Chen

**JOINT CASE MANAGEMENT
STATEMENT**

JOINT CASE MANAGEMENT STATEMENT

1 The parties, PLAINTIFF, WASHINGTON MUTUAL BANK, ("Washington Mutual")
 2 and DEFENDANT FIDELITY CAPITAL FUNDING, INC. ("Fidelity") (collectively the
 3 "Parties"), hereby submit the following Joint Case Management Statement pursuant to Civil
 4 Local Rule 16-9 and the Court's March 12, 2008 *Order Setting Initial Case Management*
 5 *Conference and ADR Deadlines*:
 6

7 1. *Jurisdiction and Service.* This Court's jurisdiction is found at 28 U.S.C. § 1332(a)
 8 insofar as this action is a dispute between corporate parties having their citizenship in different
 9 states, and insofar as this case presents a controversy in excess of \$75,000.00, exclusive of
 10 interest and costs. Defendant has accepted service of process in this action, and no parties remain
 11 to be served.

12 2. *Facts. Plaintiff's Position:* This is a dispute over the terms of a two-page written
 13 contract for the purchase and sale of residential mortgage loans between Washington Mutual as
 14 purchaser and Fidelity as seller. The contract is attached to the Complaint as Exhibit A (the
 15 "Agreement"). The contract incorporates by reference a voluminous document known as the
 16 Long Beach Mortgage Seller Guide (the "Seller Guide"), which Seller Guide contains, among
 17 other terms, written representations and warranties concerning loans to be sold under the
 18 Agreement.
 19

20 Twelve of the loans Fidelity sold to Washington Mutual are the subject of this
 21 action. After purchasing them, Washington Mutual sent written demands to Fidelity describing
 22 that the loans violated reps and warranties in the Seller Guide such that Fidelity was obligated to
 23 repurchase them (buy them back). The Complaint alleges that Fidelity did not meet this demand,
 24 creating a breach of contract that damaged Washington Mutual.
 25

26 The specific violation that Washington Mutual cites as the basis for its repurchase
 27 demands is found at Section 604 of the Seller Guide. Section 604 defines something known as an
 28

1 Early Payment Default, an event occurring when a loan sold becomes 30 or more days delinquent
2 in the payment of the first monthly payment owed to Washington Mutual after the loan is sold.

3 Fidelity's Answer admits the existence of the Agreement, admits that the language
4 discussed in the Complaint, Section 604 of the Seller Guide, is incorporated into the Agreement,
5 admits that the loans at issue constituted business transactions between itself and Washington
6 Mutual, admits to receiving Washington Mutual's demands, and admits that it did not meet those
7 demands or make payment. Fidelity's Answer continues with a section on affirmative defenses in
8 which Fidelity raises 24 discrete defenses.

10 Defendant's Position: Fidelity's Answer denies the substantive allegations of the
11 Complaint and raises a number of defenses. Fidelity anticipates that the disputed factual issues
12 may include the following: whether the Agreement attached to the Complaint governs the rights
13 and obligations of the parties with respect to the subject loans; whether other agreements between
14 Fidelity and plaintiff and/or its predecessor govern the rights and obligations of the parties with
15 respect to the subject loans; whether the subject loans were underwritten and approved by
16 Plaintiff; whether Fidelity had knowledge of the terms of the Seller Guide that are purportedly
17 incorporated into the Agreement attached to the Complaint; whether any of the loans have been
18 foreclosed or sold; and the amount of plaintiff's claimed damages.

20 3. *Legal Issues.* Plaintiff's Position: This action presents the legal issues of contract
21 formation, performance or breach, and remedies.

23 Defendant's Position: Fidelity anticipates that the legal issues will include whether the
24 plaintiff's attempt to incorporate the Seller Guide into the Agreement is sufficient under
25 California law (e.g. Scott's Valley Fruit Exchange v. Grower's Refrigeration Co. (1947) 81 Cal
26 App. 2d 437); whether the terms of the Seller Guide, if incorporated, are unconscionable (Civil
27 Code Section 1670.5), and whether the action is barred, in whole or in part, by California's anti-
28

1 deficiency laws (Code of Civil Procedure 580d).

2 4. *Motions.* There are no pending motions in this action.

3 5. *Amendment of pleadings.* Both Parties would like to reserve the right to amend
4 their pleadings within the allowances of the Rules, in the event that facts learned in discovery
5 other events necessitate an adjustment of any of the Parties' pleaded allegations.
6

7 6. *Evidence preservation.* This action concerns the Parties' contract documents
8 and documents amounting to business records generated by the parties' purchase and sale of the
9 twelve loans at issue. Both Parties believe that these material documents have been preserved in
10 the normal course of their businesses, and that these documents will be exchanged, during, among
11 other stages of this action, in connection with their initial disclosures.
12

13 7. *Disclosures.* The parties will have timely exchanged their Rule 26 initial
14 disclosures prior to the date of the case management conference.

15 8. *Discovery.* No discovery has been taken to date. Both Parties anticipate the
16 taking of discovery to the extent that the Rules allow. The Parties to intend to complete their fact
17 discovery within six months. The Parties do not propose any modification of the provisions of the
18 Rules pertaining to discovery.

19 9. *Class Action.* This suit is not a class action.

20 10. *Related cases.* There are no cases between the Parties pending before this Court,
21 or another judge of this Court, or any other court or body.
22

23 11. *Relief.* Washington Mutual's Complaint seeks specific monetary relief in the form
24 of the repurchase of the twelve loans at issue at Washington Mutual's basis in each loan, an
25 amount equal to their principal and interest balances, plus several other expenses incurred relating
26 to premium refunds and recoupment of paid escrow expenses, plus attorney's fees. As to any of
27 the twelve loans which have been foreclosed prior to entry of the Court's judgment, Washington
28

1 Mutual seeks a make-whole payment equal to the net post-foreclosure loss suffered, or stated
 2 another way, equal to the repurchase amount owed for each such loan less any foreclosure
 3 proceeds received.

4 12. *Settlement and ADR.* The Parties suggest that prospects for settlement are good.
 5 The parties propose to comply with the Court's ADR plan by mediating before a Court-approved
 6 mediator. The Parties are unaware of what key discovery developments or motions are
 7 necessary for the enhancement of the prospects of resolving their dispute.
 8

9 13. *Consent to Magistrate Judge.* The Parties consent to the assignment of this action
 10 to a magistrate judge.

11 14. *Other References.* The Parties do not feel that binding arbitration, a special master,
 12 or a multi-district litigation panel are implicated here.
 13

14 15. *Narrowing of Issues.* The Parties suggest that many of the facts pleaded in the
 15 Complaint can be stipulated to, and that after discovery the Parties can present the Court with a
 16 joint stipulation of uncontested facts.

17 16. *Expedited Schedule.* The Parties do not feel that an expedited schedule is
 18 necessary.
 19

20 17. *Scheduling.* The Parties propose the following timing sequence for the
 21 following events:

22 Trial, within 12 months of the date of filing of the Complaint (March, 2008);

23 Designation of experts, 90 days prior to trial;

24 Discovery cutoff (non-expert), 90 days prior to trial;

25 Dispositive motion filing deadline, 90 days prior to trial;

26 Pretrial conference, 14 days prior to trial.
 27

28 18. *Trial.* This action will be tried non-jury.

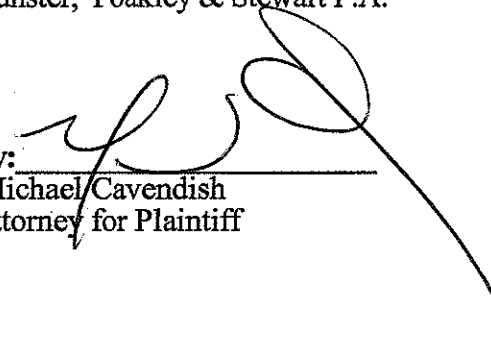
1 19. *Disclosure of Non-Party Interested Entities or Persons.* Both parties expect to
2 timely file their Certifications of Interested Entities or Persons required by Civil Local Rule 3-16.

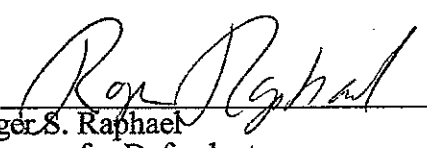
3 20. *Other Matters:* None
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5
6 Respectfully submitted,

7 Gunster, Yoakley & Stewart P.A.

Lewis Brisbois Bisgaard & Smith, LLP

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9
10 By: 
11 Michael Cavendish
Attorney for Plaintiff

By: 
12 Roger S. Raphael
13 Attorney for Defendant
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